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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

~~Misc.~~

No. 980

JOE DAVIS,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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On the Petition,
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JOE DAVIS

Petitioner,

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner, Joe Davis, respectfully requests a Writ of Certiorari to the United States Court of Appeals for the Second Circuit to review a judgment of that Court which affirmed, with one of the three Judges of that Court dissenting, Petitioner's conviction for violating 18 U. S. C. Sec. 1461, 1463 by sending obscene phonographic records through the mails and mailing matter in indecent covers.

Opinion Below.

Petitioner was convicted on November 18, 1964 after a trial by jury in the Southern District of New York. No opinion was written by the judge who presided at the trial.

The United States Circuit Court of Appeals for the Second Circuit affirmed, in an opinion, on December 6, 1965, the judgment of conviction with one of the three judges of

that Court dissenting. The majority and dissenting opinions are reproduced as Appendix "A" to this Petition and the judgment of the Court of Appeals is reproduced as Appendix B to this petition.

Jurisdiction.

The judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed was entered on December 6, 1965. Associate Justice John M. Harlan, on January 5, 1966, granted an extension to February 4, 1966 of Petitioner's time to file his petition for certiorari. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254.

The Questions Presented for Review.

1. Whether conviction of Petitioner for sending materials through the mails where there was no proof that the material exceeded the limits of candor permitted in the nation, no proof of the effect of the material, and no proof of the obscene nature of the material was a denial of petitioner's First Amendment rights.

2. Whether the rights guaranteed by the First Amendment were violated by the Petitioner's conviction of mailing obscene matter, without proof that he knew the character of the matter and without proof that he knew or had reason to believe it obscene.

3. Whether the conviction of Petitioner for sending through the mails material that is not "hard-core pornography", was a denial of due process and an infringement of the right of communication.

4. Whether the Trial Court, in convicting Petitioner and the Appellate Courts in affirming his conviction for

mailing obscene material, judged the material obscene in accordance with standards in conflict with those prescribed by this Court, and punished Petitioner in violation of the First Amendment of the Constitution.

5. Whether 18 U. S. C. 1461 and 1463 as interpreted and applied in this case infringes the right of communication protected by the First Amendment.

6. Whether the standards previously proscribed by this Court in determining if films, books, and photographs are obscene are the standards to be used in determining whether phonograph records are obscene.

7. Whether the conviction of Petitioner for sending through the mails advertisements (not inthemselves obscene) that referred to obscene phonograph records, without proof that Petitioner knew or had reason to believe that the phonograph records were obscene, denies Petitioner's rights of communication.

8. Whether the rights guaranteed by the First Amendment were violated by Petitioner's conviction for mailing obscene matter where there was no proof that the materials' appeal was to the prurient interest, no proof concerning the relationship of "contemporary community standards" to the material's "prurient appeal" or to the materials' "patent offensiveness", and no proof as to the nature of the audience to whom the material was directed.

Constitutional Provision and Statutes Involved.

The constitutional provision involved is the First Amendment to the Constitution of the United States. The Federal Statute referred to herein is 18 U. S. C. 1461, 1463. The following are the pertinent portions of 18 U. S. C.

§1461. Mailing obscene or crime-inciting matter.

Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and——

* * * * * *

Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained . . . Is declared to be nonmailable matter.

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

* * * * * *

§1463. Mailing indecent matter on wrappers or envelopes.

All matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which, and

all postal cards upon which, any delineations, epithets, terms or language of an indecent, lewd, lascivious, or obscene character are written or printed or otherwise impressed or apparent, are nonmailable matter. . . .

Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable matter, or knowingly takes the same from the mails for the purpose of circulating or disposing of or aiding in the circulation or disposition of the same shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Statement of the Case.

This is an appeal from a conviction and sentence after a trial by a jury, in the Southern District of New York, for violation of 18 U. S. C. 1461, 1463, for sending phonograph records said to be obscene through the mails and mailing matter in indecent wrappers.

The indictment contained 24 counts (R. 4-10)*. The Petitioner was convicted on all counts except the last which was dismissed during trial on the Government's motion (R. 51). Counts one through five of the indictment charged Davis with mailing packages in violation of 18 U. S. C. 1463 whose wrappings bore an obscene label advertising a record (R. 4-7). Counts six through twenty-one charged a violation of 18 U. S. C. 1463 in Davis' mailing of advertisements, not inthemselves obscene, which described the means for procuring two obscene records (R. 5-7). The two allegedly obscene records are the subject of counts twenty-two and twenty-three of the indictment (R. 8, 9). The record jackets indicate the records were manufactured in

* Numerical References following the letter R are to the Record on Appeal.

California. Petitioner is charged only with mailing the records and not with manufacturing them (R. 9). The advertisements were primarily pages in a catalogue prepared by the manufacturers of the records (R. 29).

The issue of Petitioner's guilt was submitted to the jury without the introduction of any evidence other than the records, labels and advertisements referred to in the indictment (R. 52). Petitioner and Respondent stipulated, at the trial (a) "the packages in question were deposited in the mails" (R. 21); (b) "the packages were deposited in the Southern District of New York on or about the dates specified in the indictment" (R. 21); (c) "when they were deposited they bore the labels" (R. 21); (d) "defendant intentionally deposited them or caused them to be deposited knowing of the presence of the labels" (R. 21).

The phonograph records were played to the jury and after the exhibits (the records, their jackets, the mailing wrapper and the advertisements) were introduced into evidence the Government rested (R. 54). The issues submitted for the jury's determination were the "mailability of the packages" and petitioner's "knowledge of the nature of the materials" (R. 29).

The Court in its charge directed the jurors to use their "experience in life . . . to try to consider how the average person in the nation as a whole, not only where you live or work," would react to these materials. The jurors were directed to "project themselves" and "make an objective determination based upon contemporary community standards" (R. 25). The Trial Court advised them that "as a representative group of mature citizens you are in an excellent position to judge what the current standards may be. I am sure some, if not most of you have travelled and you have encountered a broad number of people. . . . When you share these observations together in the jury room you

should be able to judge the works involved in this case according to contemporary community standards'' (R. 25, 26).

The Court, on the issue of scienter, charged the jury that Petitioner's belief that the material is not obscene ''is immaterial even though such be an honest belief'' (R. 26, 29).

Petitioner's motion to dismiss after the conclusion of the Government's case was denied, and after the jury returned a guilty verdict the Court denied Petitioner's motion to set aside the verdict and for an acquittal (R. 54). The Trial Judge, believing he, as well as the jury was required to ascertain whether the materials were obscene found them to be obscene (R. 54).

No evidence was offered at the Trial with respect to the nature of the materials tolerated in the nation, with respect to the standards of the nation, or with respect to the effect of the material.

The allegedly obscene material that forms the basis of the indictment consists of a mailing wrapper (Counts 1 through 5) and two phonograph records (Counts 22 and 23). The humor on the wrapper is the kind of ''double entendre'' type language that is commonly used in present-day culture (Exhibit 2). The first record ''Erotica'' (Exhibit 22-A) does not contain words—only percussion instruments and various human sounds. The second record, ''Nights of Love in Lesbos'' (Exhibit 23-B), is an oral rendition of extracts from the poem ''Songs of Bilitis'', by the French poet Pierre Louys (1870-1924) (Exhibit 23-A). Since 1904, this poem (and his other poems, plays and novels) has had widespread circulation in the United States.

It was published in English in the United States by the Liveright Publishing Corp. and by Random House in hard-cover as part of anthologies of Louys' work and by the Hearst Corporation, in paperback, as part of its Avon Classics series (Collected Works of Pierre Louys, Liveright Publishing Corp., 1932; Collected Works of Pierre Louys, Avon Publishing Corp., 1951). Pierre Louys' work is recognized by scholars as possessing artistic merit (Painter, Proust, The Early Years, Little Brown and Company (1965) p. 169; Collected Works of Pierre Louys, Avon Publishing Corp. (1951) Introduction).

"Songs of Bilitis", a prose poem, utilizes Louys extensive knowledge of classical sources including Greek anthology, Greek legend and history and Greek poetic style. The poem tells of the growth and emotions of Bilitis, a young Greek girl born at the beginning of the sixth century B. C. and of her travels in Cypress and Myteliene, then called Lesbos.

The Trial Judge's finding that the poem is a "dissertation by an alleged Lesbian" is incorrect (R 41a).

No evidence was offered at the trial to show the accused knew or had reason to believe the materials were obscene. The prices charged for the material indicates Petitioner believed he was not selling forbidden items. The record jackets for each of the records are not claimed to be obscene and—they indicate the list price for the records was $4.98 and $6.95. Readings of poems by Dylan Thomas, T. S. Elliot and W. H. Auden and other "spoken word" phonograph records all sell for approximately the same prices. Schwann, Long Playing Record Catalogue January, 1966 (pp. 171-184).

Reasons for Allowance of the Writ.

Preliminary Statement

The constitutional questions referred to in this Petition are substantial and the questions presented for review have not been adjudicated and should, we believe, be resolved by this Court. Each of the questions presented relates to the fundamental right of expression and is of sufficient public importance and interest to merit plenary consideration.

One of the questions raised that this Court has not yet passed on is: whether the Government is required, in a federal criminal prosecution, for mailing obscene matter, to introduce evidence to prove that the material offends the community standards, is beyond the limits of candor tolerated in the community, and would arouse the prurient interest of adults of the community.

Assuming that prurient appeal can be adequately defined, other questions suggested in *Manual Enterprises* v. *Day,* 370 U. S. 478, and most recently formulated in *U. S.* v. *Klaw,* 350 F. 2d 155 (2 Cir., 1965), are still open: "Appeal to whose prurient interest? Judged by whom? On what basis? Is it the 'average person' who applies 'contemporary community standards' to determine if the 'dominant theme' appeals to 'prurient interest'. Who applies 'contemporary community standards' to determine that the 'dominant theme' appeals to 'prurient interest' of the 'average person'? Do 'contemporary community standards' operate to reduce potential prurient appeal? Or, do they operate to measure the 'patent offensiveness of an excess of candor'?" (*U. S.* v. *Klaw,* 350 F. 2d 155, 173).

In *Manual Enterprises* v. *Day,* 370 U. S. 478, 481-482, (1962), Justices Harlan and Stewart indicated that the question of the relevant audience in an obscenity prosecution was open. This case presents that issue as well as the

question of the mental element requisite to a constitutionally permissible federal obscenity prosecution. (*Manual Enterprises* v. *Day, supra; Smith* v. *California,* 361 U. S. 147.)

One of the questions confronting the Court is whether one definition of obscenity can apply to the entire spectrum of questionable material, whose range includes what appeals to the popular taste, to the more sophisticated, and to the sexually abnormal. This case presents the Court with an opportunity to confront these questions in regards to materials that appeal to popular taste and thus differ from the cases now pending before this Court. *Mishkin* v. *New York,* U. S. (argued on December 7, 1965) deals with material whose primary appeal is to the sexually abnormal and *Ginzburg* v. *U. S.* U. S. and *"John Cleland's Memoirs of a Woman of Pleasure"* v. *Mass.,* U. S. (both argued on December 8, 1965) deal with material whose primary appeal is to the more sophisticated.

Justices Harlan and Stewart, in *Manual Enterprises* v. *Day, supra,* indicated that prosecutions under 18 U. S. C. 1461 may constitutionally be limited to hard-core pornography. A majority of the Court has not yet resolved this issue. See *Jacobellis* v. *Ohio,* 378 U. S. 184, 187, concurring opinion of Mr. Justice Stewart.

The Manner in Which the Questions Sought to Be Reviewed Were Raised.

(1) The question of whether there was a violation of Petitioner's constitutional rights because the Government did not offer any evidence of the standards of the nation or with respect to the effect of the materials involved in this case, was raised at the trial by motion to dismiss made after the Government's case and after both sides rested, and in the argument to the Court below (R58).

(2) The question of whether the Trial and Appellate Courts below judged the materials in this case to be obscene in accordance with standards in conflict with those prescribed by this Court was raised in the Trial Court by motion to dismiss made after the Government's case and after both sides rested, and in the argument to the Court below (R58).

(3) The question with respect to the Government's failure to prove Petitioner's knowledge of the materials involved in this case or Petitioner's wrongful intent was raised at the trial by motion to dismiss made after the Government's case and after both sides rested, and in the argument to the Court below (R58).

(4) The question of whether the conviction of one who, without guilty knowledge or intent, mails obscene matter is an abridgment of freedom of communication was raised at the trial by motion to dismiss made after the Government's case and after both sides rested, and in the argument to the Court below (R58).

(5) The question of whether the standards previously prescribed by this Court in determining if films, books and photographs are obscene are the standards to be used in determining whether phonograph records are obscene was raised at the trial by motion to dismiss made after the Government's case and after both sides rested, and in the argument to the Court below (R58).

(6) The question of whether the conviction of Petitioner for sending advertisements (not in themselves obscene) through the mails because they referred to allegedly obscene phonograph records, without proof that Petitioner knew or had reason to believe the phonograph records were obscene, denies Petitioner's rights of communication was raised at the trial by motion to dismiss made after the

Government's case and after both sides rested, and in the argument to the Court below (R58).

(7) The question whether the rights guaranteed by the First Amendment were violated by Petitioner's conviction for mailing obscene matter where there was no proof that the material's appeal, if any, was to the prurient interest, no proof concerning the relationship of "contemporary community standards" to the material's "prurient appeal" or to the materials' "patent offensiveness", and no proof as to the nature of the audience to whom the material was directed, was raised at the trial by motion to dismiss made after the Government's case and after both sides rested, and in the argument to the Court below (R58).

The Questions Presented Are Substantial.

I. 18 U. S. C. 1461 and 1463 as interpreted and applied in this case violates the Federal Constitutional guarantees of freedom of communication and due process because they authorize the punishment of one who mails allegedly obscene material, that is not hard-core pornography, without requiring proof that the material offends the standard of the people of the nation and that the material is obscene according to any of the standards formulated by this Court.

> "Obscenity under the Federal Statute thus requires proof of two distinct elements (1) patent offensiveness, and (2) 'prurient interest' appeal. Both must conjoin before challenged material can be found 'obscene under Section 1461." Manual *v.* Day, 378 U. S. 478, 486, opinion of Mr. Justice Harlan and Mr. Justice Stewart.
>
> "If cases were well prepared and were conducted with the appropriate concern for constitutional safeguards Courts would not hesitate to enforce the laws

against obscenity". Jacobellis *v.* Ohio, 378 U. S. 202, dissenting opinion of the Chief Justice and Mr. Justice Clark.

In a criminal prosecution for selling an obscene article the prosecution has the burden of proving affirmatively every essential element of the offense. *United States* v. *Klaw,* 350 F. 2d 155 (2nd Cir.), *Alexander* v. *United States,* 271 F. 2d 140 (8th Cir.). "Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the fact finder of his guilt" and the transcendent value of speech is involved" due process requires "that the State bear the burden of persuasion to show the (accused) engaged in criminal speech." (*Speiser* v. *Randall,* 357 U. S. 513, 526. (Matter in parentheses ours.) See also *Thompson* v. *Louisville,* 362 U. S. 199, 207, and cases cited in *New York Times* v. *Sullivan,* 376 U. S. 254, 271, 277-280, 283-288.

The threshold question in determining whether material may be condemned as obscene, or one may be punished for selling it, is whether it is considerably more explicit and bolder in treatment than other material of the same nature that is generally tolerated. If communications are not "so offensive on their face as to affront current community standards of decency," to use Mr. Justice Harlan's phrase (*Manual Enterprises* v. *Day,* 370 U. S. 478, 482), to punish one for distributing them violates the First Amendment guaranty of freedom of expression. "The community cannot where liberty of speech and press are at issue, condemn that which it generally tolerates." (*Smith* v. *California,* 361 U. S. 147, 171 (concurring opinion, Mr. Justice Harlan)).

Proof must be furnished to supply "the fact-finders with knowledge of what appeals to prurient interest so they

have some basis for their conclusion". *United States* v. *Klaw*, 351 F. 2d 155 (2nd Cir., 1965). "Obviously the issue of what stirs the lust . . . requires evidence of special competence" (*Klaw* v. *Schaffer*, 151 F. Supp. 534, 539, Note 6). See also *Parmelee* v. *United States*, 113 F. 2d 729, 731; *Yudkin* v. *State*, 229 Md. 2d 223, 182 A. 2d 788. "The question is whether 'there is sufficient evidence in the record upon which a finding of obscenity could be made. If there is no evidence in the record upon which such a finding could be made, obviously the material involved cannot be held obscene.' *Cf. Thompson* v. *City of Louisville*, 362 U. S. 199, 4 L. Ed. 2d 654." *Jacobellis* v. *Ohio*, 378 U. S. 184, 202, dissenting opinion of The Chief Justice and Mr. Justice Clark.

In *Jacobellis* v. *Ohio*, 378 U. S. 184, Mr. Justice Brennan wrote (p. 191):

> "It should also be recognized that the Roth standard requires in the first instance a finding that the material 'goes substantially beyond customary limits of candor in description or representation of such matters'."

The convictions in this case were sustained on the basis of speculations and suspicions about the prurient appeal of material to some unknown, undefined person about whom no information was furnished. There is no evidentiary basis from which to recognize any appeal to the prurient interest of the typical recipient, and, hence the motion for a directed verdict of acquittal should have been granted for "(O)therwise too easily the Government's test might allow a jury to equate patent offensiveness to prurient appeal, thus obliterating the conjunction that has been thought indispensable. See *Manual Enterprises, Inc.* v. *Day, supra*, 370 U. S. at 482; *Jacobellis* v. *Ohio, supra*, 378 U. S. at 191-

92." *U. S.* v. *Klaw*, 350 F. 2d 155, 167 (2nd Cir. 1965). It cannot be assumed that the Trial Judge or the jury in this case, or the Judges of the Courts to which Petitioner appealed from his conviction, knew "with anything that approximates reliability, the 'average' American public opinion on the subject. . . ." (*Roth* v. *Goldman*, 172 F. 2d 788, 796, 2nd Cir., 1952).

The jurors may not "consider their own personal reactions as setting the standards"; there is too much truth in the observation that "what is pornography for one man is the laughter of genius to another." Cf. Ass'n of Bar of the City of New York, Comm. on the Bill of Rights, Report on H. R. 319, 88th Cong., 2d Sess. (1964), on "Morally Offensive Mail," in Reports of the Ass'n of the Bar Concerned with Federal Legislation 54, 56 (1965). "In this case, however, the only predicate for any conclusion about prurient appeal was the material itself, as if *res ipsa loquitur*. The jurors were, therefore, left to speculate. They were invited to behold the accused material and, in effect, conclude simply that it is undesirable, it is distasteful, it is disgusting. Knowing perhaps that they would not be interested in obtaining more of the material they might wonder why anyone else would, and conclude that the only answer is 'prurient appeal.' Because the jury was given no basis for understanding exactly how and why the material appeals to its audience, whether deviate or average person, it may too readily supply an explanation—'prurient appeal.' Even if the jury did not consist of twelve carefully selected Anthony Comstocks, it might well believe that the predominant appeal of certain acknowledged works of art, sculpture and literature found in all our well-known museums and libraries would be to the prurient interest of the average person, or perhaps someone else. . . . Whatever

the value of mere 'autoptical' evidence in other contexts, it should not readily be countenanced in this area." *Klaw* v. *U. S.*, 350 F. 2d 155, 167.

The material in evidence is not hard-core pornography and is not punishable. Mr. Justice Harlan and Mr. Justice Stewart in *Manual Enterprises* v. *Day*, 370 U. S. 470, 489 noted "some authoritive commentators have considered *Roth* and subsequent cases to indicate that only hard-core pornography can constitutionally be reached under this or similar state obscenity statutes." See also *Jacobellis* v. *Ohio*, 378 U. S. 184, 197, concurring opinion of Mr. Justice Stewart; *People* v. *Richmond*, 9 N. Y. 2d 578.

"Songs of Bilitis" can be read throughout the nation and our research indicates there have not been any criminal prosecutions of books containing the poem. It is not, therefore, constitutionally permissible to ban an oral rendering of the poem. We do not believe standards should differ in determining the obscenity of books and records.

Our research indicates there has never been a federal obscenity prosecution of material which is non-verbal and non-pictorial, as is the record "Erotica", and we do not believe a decision that this material is obscene is constitutionally valid.

The majority opinion of the Court of Appeals found the materials obscene and refused to consider Petitioner's argument that Respondent failed to sustain its burden of proof because Petitioner and Respondent were given an opportunity to present proof that the materials were not obscene (and did not do so) and because Petitioner and Respondent agreed to present the issue of mailability to the jury "without testimony of any kind" (R. 53). This incorrect interpretation of the stipulation is contradicted by the Trial Judge's charge to the jurors on the issue

of obscenity (See page 6 of this petition, R. 21, 25, 26). Petitioner is not, in the first instance, required to present proof of the material's character and is not required to advise the Government of the insufficiency of the Government's proof. We believe Judge Waterman's dissenting opinion finding the materials not obscene and analyzing the Trial Judge's charge and concluding that the conviction must be reversed because "the Government was deficient in its proof" is correct.

II. 18 U. S. C. 1461, 1463 violates the constitutional guarantees of freedom of communication in sanctioning a conviction for mailing of obscene material without proof that the accused knew the materials were obscene.

In *Manual Enterprises* v. *Day,* 378 U. S. 478, 492-495, Mr. Justices Harlan and Stewart held a conviction for a violation of 18 U. S. C. 1461 could not stand absent a showing defendant "knew the character of such materials was offensive." See also *Smith* v. *California,* 361 U. S. 147, 154; *Roth* v. *U. S.,* 354 U. S. 476.

In Smith v. *California,* 361 U. S. 147, the Court struck down an ordinance making the offering of obscene books a penal offense even though the bookseller may not have been aware of the content of the material offered. A statute eliminating the scienter element, this Court held in *Smith* v. *California,* 361 U. S. 147, tends to restrict the sale and distributions of constitutionally protected expression by making it necessary for booksellers to read all books received for sale, in order to avoid criminal liability. The burden on a seller of phonograph records is even more onerous for he cannot be expected to listen to every record

he sells and cannot be expected to listen to every record advertised in a manufacturer's catalogue. *Manual Enterprises* v. *Day*, 370 U. S. 478, 493.

The Court's reasons for condemning the ordinance involved in *Smith* v. *California*, apply with equal force to the application of the statute here challenged. In the *Smith* case the Court said, 361 U. S. at p. 152:

> "The ordinance here in question, to be sure, only imposes criminal sanctions on a bookseller if in fact there is to be found in his shop an obscene book. But our holding in Roth does not recognize any state power to restrict the dissemination of books which are not obscene; and we think this ordinance's strict liability feature would tend seriously to have that effect by penalizing booksellers, even though they had not the slightest notice of the character of the books they sold."

In the *Manual* case the Court said, 370 U. S. at page 493:

> "Since publishers cannot practicably be expected to investigate each of the advertisers, and since the economic consequences of an order barring even a single issue of a periodical from the mails might entail heavy financial sacrifice, a magazine publisher might refrain from accepting advertisements from those whose own materials could conceivably be deemed objectionable by the Post Office Department. This would deprive such materials, which might otherwise be entitled to constitutional protection, of a legitimate and recognized avenue of access to the public."

A statute prohibiting the mailing of obscene matter that fails to require proof of knowledge that it is obscene, imposes an excessive burden on free speech, *Manual Enter-*

prises v. *Day,* 378 U. S. 479. See *Lamont* v. *Postmaster General,* 381 U. S. 201 (1965).

The Judge's charge to the jury in this case that Petitioner's "belief that the material is mailable is immaterial even if his belief is an honest one" is in conflict with the Constitution (R. 26). The State Courts have held, in cases decided after *Smith* v. *California, supra,* that a defendant accused of dealing in pornography cannot be found guilty unless the State proves he had knowledge of the obscene nature of the material. *Cohen* v. *Florida,* 125, So. 2d 560, 563; *State* v. *Sul,* 146 Conn. 78, 84-88, 147 A. 2d 686, 690-691; *State* v. *Hudson County News,* 35 N. J. 284, 292-294, 173 A. 2d 20, 25; *State* v. *Oman,* 261 Minn. 10, 17-18, 110 N. W. 2d 514, 520; *State* v. *Locks,* 97 Ariz. 148, 397 P. 2d 949, 951; *Demetropolos* v. *Commonwealth,* 342 Mass. 658, 661, 175 N. E. 2d 259, 262. The rule in a federal prosecution for obscenity cannot be less stringent. *Manual Enterprises* v. *Day,* 370 U. S. 478; *Alexander* v. *United States,* 271 F. 2d 140 (8th Cir.). There was nothing on the record jackets to reveal the allegedly obscene nature of the records or require further investigation on Petitioner's part to determine whether they were in any way improper. There is no proof he ever saw the advertisements for they were primarily contained in pages in a catalogue prepared by the manufacturer of the records. The fact the records were offered at the standard price would also indicate Petitioner did not consider it contraband.

The proof in this case failed to establish any knowledge on the part of Petitioner with respect to the alleged obscene character of the materials and failed to estabish any wrongful intent on his part. 18 U. S. C. 1461, 1463 as interpreted and applied in this case is therefore in conflict with the

Constitution and Petitioner's conviction for violating the statute should be set aside.

For the reasons outlined it is submitted the questions presented are substantial, and this petition for a writ of certiorari should be granted and a plenary consideration of the issues is warranted.

Respectfully submitted,

MARTIN GARBUS,
Attorney for Petitioner.

APPENDIX A.

Opinion.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT

No. 455—September Term, 1964.

(Argued April 28, 1965 Decided December 6, 1965.)

DOCKET No. 29518.

UNITED STATES OF AMERICA,

Appellee,

v.

JOE DAVIS,

Defendant-Appellant.

Before:

LUMBARD, Chief Judge,

WATERMAN and FRIENDLY, Circuit Judges.

Appeal from conviction for mailing obscene matter and mailing matter in obscene wrappers, 18 U. S. C. §§1461, 1463, after a trial before Irving R. Kaufman, *Circuit Judge,* sitting by designation, and a jury, in the United States District Court for the Southern District of New York.

Affirmed.

LUMBARD, *Chief Judge:*

This is an appeal from a conviction and sentence after a trial by a jury, in the Southern District of New York,

for violation of 18 U. S. C. §§1461, 1463, sending obscene matter through the mails and mailing matter in indecent wrappers.

Counts one through five of the indictment charged that on various occasions Davis mailed packages whose wrappings bore an obscene label advertising defendant's "party records," in violation of §1463. Counts twenty-two and twenty-three charged the mailing of two obscene phonograph records, in violation of §1461, and counts six through twenty-one charged the mailing of advertising which described the means for procuring the obscene records of counts twenty-two and twenty-three, in violation of §1461.[1] As it is not alleged that these advertisements are themselves obscene, there must be a finding that the phonograph records are obscene in order to find the advertisements violative of §1461.

At trial, the parties stipulated the existence of each and every element of the crime charged, except that the phonograph records and labels were obscene. In oral argument before this court both sides declared they had agreed to submit the remaining issue to the jury without any testimony of any kind. The opportunity to require and present evidence about community standards of obscenity existed but was declined by that agreement. Compare *United States* v. *Klaw,* 350 F. 2d 155 (2 Cir. 1965). The jury had before it only the labels, the advertisements, the phonograph records and record jackets.

The jury returned a verdict of guilty on all counts. Judge Kaufman, who presided at the trial, then made an independent examination of the evidence and determined that the

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[1] Count twenty-four, charging Davis with conspiring to violate §1461, was dismissed during trial on the government's motion.

finding of guilty by the jury did not invade Davis' First Amendment rights to freedom of the press and speech as the materials at issue were obscene and therefore not entitled to First Amendment protection. He imposed a fine of $1,000 on count one, and concurrent six-month suspended sentences on the remaining counts.

Davis does not allege as error any portion of Judge Kaufman's charge or the procedure employed by the district court. The sole issue before us is the same as was before Judge Kaufman, whether Davis is entitled to First Amendment protection because the labels and records are not obscene. We find that they are obscene under the tests established by the Supreme Court, and we affirm the judgment below.

To determine whether the matter before us is obscene, we must apply the now familiar test:

> "Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." *Jacobellis* v. *Ohio,* 378 U. S. 184, 191 (1964); *Roth* v. *United States,* 354 U. S. 476, 489 (1957).

Further, we are instructed to determine whether the material is patently offensive. *Mutual Enterprises, Inc.* v. *Day,* 370 U. S. 478, 486 (1962).

Applying these tests, we find that both the labels and the records are obscene. The records are without "literary or scientific or artistic or any other form of social importance." *Jacobellis* v. *Ohio, supra,* at 191. Each record jacket and record "taken as a whole" makes abundantly clear that meaning and content of the recording. We also find that, despite the feeble attempt at double-entendre humor on the

mailing label, the sole intended meaning of the label is obvious and far exceeds the permissible level of candor.

The appellant's other contentions do not merit discussion.

The judgment is affirmed.

WATERMAN, *Circuit Judge* (dissenting):

I dissent. I would reverse.

At trial, on November 18, 1964, the parties orally agreed that certain acts took place; the defendant conceded that the Government could call witnesses who would testify to these acts and thereby the commission of the offenses would be proven if the material mailed, exhibits in the case, were non-mailable. The exhibits were appellant's yellow gummed labels affixed to the outside of his packages, informing that he had "sexational" party records available, his advertising circular, two phonograph records, and the respective jackets containing those records.

As stated in the majority opinion, the only contested issue was whether the phonograph records and labels were obscene so that the acts of the defendant in causing them to be sent through the mails violated 18 U. S. C. §§1461, 1463. And so, as stated in the opinion of the majority, the issue of defendant's guilt was submitted to the jury without the introduction into evidence of any oral testimony whatsoever. The phonograph records were played to the jury. After the exhibits were introduced into evidence and the records played to the jury, the Government rested, the defense put in no case whatever and moved to dismiss. The motion was denied, and the trial judge in his charge to the jury so adequately explained the nature of the case that

no exception to the charge was taken by either party and no request for an additional or explanatory charge was made. The jury was out but thirty-five minutes and returned a guilty verdict. A motion by the defense to set the verdict aside and for an acquittal was denied, and the judge believing that he, as well as the jury, was required to ascertain whether the exhibits were obscene, found that they were by any test that he had been able to observe.

The trial judge had in mind that this case involves "rights derived from the First Amendment guarantees of free expression" and believed that a judge at the trial level "cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected." *Jacobellis* v. *Ohio*, 378 U. S. 184, 190 (Brennan, *J.* opinion upon announcing the Court's judgment, in which Goldberg, *J.* concurred). If it were necessary for me also to accept this responsibility I would hold that the yellow mailing labels had no "literary or scientific or artistic or any other form of social importance" and that they exceeded the permissible level of candor which the First Amendment protects. On the other hand, the are so cheaply repulsive that it is incredible to me that the prurience of any person would be excited from reading them or from anticipation of receipt of the "sexsational" records. As to the records, I must say that they bored me and whatever is meant by appealing to the "prurient interest" neither of them did so appeal. Nevertheless, my personal reaction to these records, different from the reaction of the twelve jurors and the trial judge, is not the basis for my dissent. I would reverse on the ground that the verdict below was not supported by sufficient evidence.

The jury was charged that the issue for them to decide was whether the material would be deemed obscene by the

average person, applying contemporary community standards, and the judge went on to charge that in "determining community standards you must try to use your experience in life, the observations you have made in your every-day affairs . . . so that you can make an objective determination based upon community standards of the nation of which you have been aware."

No evidence was introduced tending to show what these contemporary community standards of the nation were. The judge in his comments confirming the result the jury reached stated that his view was based on an attempt "to divine what I consider to be the mores of the country based on my years of experience and travel and observations and readings . . ."

The practice of allowing the fact finder to decide the issue of obscenity *vel non* by appraising the challenged material in light of a court-elaborated definition of obscenity has been established in this circuit and was adhered to in the present case. The announced rationale of this practice is that obscenity "is a function of many variables, and the verdict of the jury is not the conclusion of a syllogism of which they are to find only the minor premises, but really a smal bit of legislation ad hoc, like the standard of care." L. Hand, *J.*, in *United States* v. *Levine*, 83 F. 2d 156, 157 (2 Cir. 1936). Acepting the jury's conclusion to be a small bit of legislation it made little sense to require the prosecution to present testimony tending to prove that the material in question was in fact unacceptable to the community or that the material would arouse the prurient interest of the average man. This view of the jury's function has even led several courts to go further and to exclude all evidence of community standards offered by the defendant. E.g.,

Kahm v. *United States*, 300 F. 2d 78 (5 Cir.), *cert. denied*, 369 U. S. 859 (1962); *People* v. *Finkelstein*, 11 N. Y. 2d 300, 183 N. E. 2d 661, 229 N. Y. S. 2d 367, *cert. denied*, 871 U. S. 863 (1962). But cf. *Smith* v. *California*, 361 U. S. 147, 160, 169 (1959) (Frankfurter, *J.*, concurring; Harlan, *J.*, concurring in part, dissenting in part). See generally 76 Harv. L. Rev. 1498-1501 (1963).

The analogy of the jury's function in a criminal case in which obscenity is charged to the jury's function in a civil negligence case was fairly persuasive as long as the jury's decision that certain material was obscene could be viewed as the legal expression of revulsion against the material by the community from which the jury was drawn because of the way the material dealt with sexual matters. But we now know that the standard is national, not local. *Jacobellis* v. *Ohio*, 378 U. S. 184 (1964). I am not persuaded that, without some evidence other than the records and labels and each juror's own personal reaction thereto, a jury can appraise such material and can accurately express in the light of national community standards the level of national community tolerance. The view that a jury is not well suited to express the national sense of what is obscene has led some courts carefully to scrutinize the allegedly obscene material before submitting it to a jury. *Flying Eagle Publications Inc.* v. *United States*, 273 F. 2d 799 (1 Cir. 1960). This same belief is reflected in *United States* v. *Klaw*, 350 F. 2d 155 (2 Cir. 1965), decided by us on July 25, 1965 after the appeal in the present case had been argued and before disposition of the appeal. In *Klaw* we reviewed all the recent cases in this field that had been brought to our attention or had been uncovered by our research, and there we reversed a conviction for mailing obscene matter which was obtained by allowing the jury to appraise certain photo-

graphs and drawings of the "bondage genre," see *U. S. v. Klaw* at 157, in light of an admittedly correct elaboration of obscenity law by the trial court. In holding that the Government was required to introduce evidence that the challenged material in fact appealed to the prurient interest of either the average man or typical deviate this court said:

> Whatever the value of mere "autoptical" evidence in other contexts, it should not readily be countenanced in this area. Otherwise, too easily the Government's test might allow a jury to equate patent offensiveness to prurient appeal, thus obliterating the conjunction that has been thought indispensable.
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> * * * * * *
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> The state of the record gave the jurors impermissibly broad freedom to convict just because, having no more informative evidence than the material itself, they might think that the average person would "recognize" that the material has prurient appeal. But again, *to whom?* In this case the jury had insufficient evidence even to "recognize" that the material appealed to the prurient interest of the average person. 350 F. 2d 155, 167.

Under the requirements we have placed upon the Government by *United States v. Klaw,* the Government was deficient in its proof. As the trial judge allowed the Government to get to the jury without introducing any evidence tending to prove that defendant's record or labels appealed to the prurient interest of either the average man or the typical deviate recipient it is my belief that the conviction should be reversed.[1] My brothers contend that the proof

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[1] The attempt of the trial judge to "divine . . . the mores of the country" cannot cure this defect. This attempted divination certainly cannot be justified as the taking of judicial notice of facts

we held was necessary to effect a conviction under 18 U. S. C. §1461 in *United States* v. *Klaw* is not applicable here. Inasmuch as the defendant expedited the trial by agreeing that he performed the acts necessary to convict if the material mailed were non-mailable and agreed to present the issue of mailability to the jury "without testimony of any kind" they hold that the defendant "stipulated the existence of each and every element of the crimes charged." In so doing, they overlook the fact that the defendant moved to dismiss after the parties had tried the case pursuant to the agreement. Even if one places no weight whatever on defendant's obvious strategy, my brothers at best would seem to hold that defendant agreed to be bound by the practice that the parties supposed existed at the time of the trial, and therefore his conviction must be affirmed. With this approach I cannot agree, either. Defendant's motion to dismiss, overruled, and to which overruling defendant preserved his position, is now being reviewed by us, and the law of this circuit at this time requires us to order that that motion be granted for failure of the Government's proof. Of course the agreement below was merely an affirmative agreement that certain facts were in existence, and if the Government were put to proof the Government could prove them; but it never was a stipulation concerning the limits of proof required to effect a conviction. The defendant never conceded that he was guilty as charged in the indictment.

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commonly known or capable of certain verification. Perhaps a court may judicially notice contemporary community standards insofar as they constitute "legislative facts" relating to the issue of obscenity, but even judicial notice of this type ought not to be allowable unless the parties are given an opportunity to furnish data bearing on the issue. See McCormick, *Evidence* §329 (1954).

APPENDIX B.

Judgment.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of December, one thousand nine hundred and sixty-five.

Present:

Hon. J. EDWARD LUMBARD,
Chief Judge,

Hon. STERRY R. WATERMAN,
Hon. HENRY J. FRIENDLY,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOE DAVIS,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk